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No. 83-2030

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE BOARD OF EDUCATION OF
THE CITY OF OKLAHOMA CITY,
STATE OF OKLAHOMA,

Appellant,

-vs.-

NATIONAL GAY TASK FORCE,

Appellee.

BRIEF OF THE STATE OF OKLAHOMA
AMICUS CURIAE IN SUPPORT
OF THE APPELLANT

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE*
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL AND FEDERAL DIVISIONS

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921
ATTORNEYS FOR APPELLANT

*Counsel of Record

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The State of Oklahoma by Michael C. Turpen, Attorney General, submits its amicus curiae, brief in support of the Appellant Oklahoma City Board of Education, in the above-entitled cause, pursuant to Sup.Ct.R. 36.4.

INTEREST OF THE AMICUS

The Attorney General has filed this amicus brief in support of the right of the legislature of the State of Oklahoma to enact statutes which allow the removal from the public school system of a teacher whose advocacy of homosexual conduct may impair the efficiency of the school system or undermine the relationship between teacher and student or cause dissention among the students themselves.

SUMMARY OF ARGUMENT

The legislature of Oklahoma has determined that a teacher who advocates homosexual conduct in a way that adversely affects students or school employees can be discharged for this reason. Oklahoma requests this Court to uphold its finding that the activities of such teachers can interfere with the proper

functioning of a school and can cause dissention among parents and students.

In Oklahoma it is a criminal act to engage in homosexual conduct. Therefore, a teacher who advocates such is advocating disobedience to the law. If Oklahoma can be required by the federal judiciary to retain such a teacher, it could not discharge other teachers who might advocate non-adherence to other laws, such as those against possession or distribution of narcotics.

A teacher occupies a special role in society. A teacher communicates to his or her students not only skills relating to classroom subjects, but by example demonstrates moral values as well. A state should be permitted to require that a public school teacher remain neutral with regard to public advocacy of issues which are controver-

sial and which may promote strife within a school system.

This Court has upheld the government's right to impose limitations upon political activities of their employees in the interest of maintaining confidence in government. The Court has also recognized the need to balance the interests of the employee as a citizen with those of the government in promoting efficiency and in dispelling disharmony.

PROPOSITION I

HOMOSEXUALITY IS A CRIME IN THE STATE OF OKLAHOMA; THEREFORE, TO PERMIT PUBLIC SCHOOL TEACHERS TO ADVOCATE, ENCOURAGE OR PROMOTE HOMOSEXUAL SODOMY WOULD BE TO ALLOW THE TEACHERS TO ADVOCATE, ENCOURAGE OR PROMOTE CRIMINAL BEHAVIOR.

The Constitution of the United States has reserved to the States the power to regulate the health, safety, morals, and general welfare of the

public. Within those powers is each states' right to regulate conduct which affects the health, safety, morals or general welfare of the public. Through this grant of power, the State of Oklahoma has declared by legislation that the commission of "detestable and abominable" conduct "committed with mankind or with beast" is a "crime against nature" and is "punishable by imprisonment. . . ." Okla. Stat. Ann. tit. 21, § 886 (West Supp.1984).

The Oklahoma Court of Criminal Appeals has repeatedly confirmed this statute's constitutional validity against challenges alleging overbreadth and vagueness. Clayton v. State, ___ P.2d ___, 55 O.B.A.J. 1786 (Sept. 7, 1984); Carson v. State, 529 P.2d 499 (Okla.Cr. 1974). The Supreme Court itself has upheld this type of statute

against attacks on constitutional grounds. Rose v. Locke, 423 U.S. 48 (1975); Wainwright v. State, 414 U.S. 21 (1973).

Since the commission of homosexual activity violates Okla. Stat. Ann. tit. 22, § 886, Warner v. State, 489 P.2d 526 (Okla. Cr. 1971); Johnson v. State, 380 P.2d 284 (Okla. Cr. 1963), therefore, the advocating, promotion or encouragement of homosexual conduct is to advocate, promote or encourage the commission of a crime.

The Oklahoma legislature has codified standards which specify the qualifications a teacher must hold to be deemed fit to teach. Legislative control over a teacher's qualification is predicated upon a rational foundation, that is, the State's interest in the further-

ance of the educational process of the children.

The educational process is the teaching of the basic skills necessary for the children to function in society. However, education does not stop with the teaching of the basic requirements of reading, writing and arithmetic. The educational system also has the duty to teach the children the basic morals and values of society. The educational process serves as a fundamental basis of the socialization of the children.

Public education is a vital part of the growth of children, teaching the basic skills as well as the responsibilities that membership in a community requires. The importance of the educational process was recognized by the

Supreme Court in 1954 in Brown v. Board of Education, 347 U.S. 483 (1954):

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." (Emphasis added) 347 U.S. at 493.

The State's responsibility to educate the children of the community has not been taken lightly for the simple reason that the responsibility includes the shaping of young minds. It

is that vital responsibility which has been entrusted in the hands of the teachers. Teachers are the backbone of the educational system.

Taking on the responsibility of educating the young, a teacher has by choice, placed himself or herself in a dominant and influential relationship with the children he or she is instructing. A teacher is more than simply a person which recites information to a classroom of students. A teacher has a substantial relationship with each child and holds many different positions in the eyes of children. As the dissent in Goss v. Lopez, 419 U.S. 565 (1975) observed:

"[The normal teacher-student relationship] is an ongoing relationship, one in which the teacher must occupy many roles - educator, adviser, friend, and, at times, parent-substitute." 419 U.S. at 594.

Standing in the shoes of such important and influential position, a teacher is a predominant role model for his students and as such, is, of course expected to publicly serve as an exemplar of those values and skills necessary to attaining civil order by upholding the laws of the state.

Again, homosexual activity is a crime. Therefore, a teacher who advocates homosexual activity is denigrating the laws of the state and the morals and values of the community. Further, such advocacy conveys a message to the students by the teacher that it is acceptable to disobey any criminal law which the student believes is wrong or unjust. The teacher is teaching civil disobedience. In the interest of educating the young, the most vital responsibility that this State carries, the State

cannot allow the "advocating, encouraging, or promoting" of this conduct. To do so would be to allow the teacher to advocate, encourage, or promote criminal behavior.

PROPOSITION II

THE LANGUAGE OF THE STATUTE CLEARLY DICTATES THAT THE PROSCRIBED CONDUCT IS THE ADVOCACY, ENCOURAGEMENT OR PROMOTION OF ACTUAL HOMOSEXUAL SODOMY WHICH CARRIES A SUBSTANTIAL RISK OF DETRIMENTALLY AFFECTING THE STUDENT.

The pertinent language of the challenged statute, Okla. Stat. Ann. tit. 70, § 6-103.15 (West Supp.1984), reads as follows:

"Public homosexual conduct means advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees;

. . .

B. In addition to any ground set forth in Section 6-103 of Title 70 of the Oklahoma Statutes, a teach-

er, student teacher or a teachers' aide may be refused employment, or reemployment, dismissed, or suspended after a finding that the teacher or teachers' aide has:

1. Engaged in public homosexual conduct or activity; and
2. Has been rendered unfit, because of such conduct or activity, to hold a position as a teacher, student teacher or teachers' aide." (Emphasis added).

The Court of Appeals for the Tenth Circuit in the present case held that "advocating, encouraging or promoting" homosexual activity was overbroad and therefore, severable from the remainder of the statute which the court held to be constitutional. 729 F.2d at 1274.

The Court made the following observation in respect to the challenged statute:

". . . The statute does not require that the teacher's public utterance occur in the classroom. Any public statement that would come to the attention of school children, their parents, or school employees that might lead someone

to object to the teacher's social and political views would seem to justify a finding that the statement 'may adversely affect' students or school employees." Id. at 1275.

However, the statute merely regulates the advocacy, encouragement or promotion of actual homosexual sodomy when the advocacy "creates a substantial risk that such conduct will come to the attention of the school children or school employees."

Furthermore, the below listed nexus factors which aid school boards in the requisite determination of fitness of the teacher after such conduct has been performed, insure that such conduct has, in fact, had an adverse affect on the ability and qualifications of a teacher to perform his or her duties.

"C. The following factors shall be considered in making the determination whether the teacher, student teacher or teachers' aide has been rendered unfit for his position:

1. The likelihood that the activity or conduct may adversely affect students or school employees;
 2. The proximity in time or place of the activity or conduct to the teacher's, student teacher's or teachers' aide's official duties;
 3. Any extenuating or aggravating circumstances; and
 4. Whether the conduct or activity is of a repeated or continuing nature which tends to encourage or dispose school children toward similar conduct or activity."
- Okla. Stat. Ann. tit. 70, § 6-103.15.

These factors impose a narrowing construction upon the statute and insure that the statute be interpreted within the scope of these well defined nexus factors. The nexus factors permit school boards to make individual determinations as to whether the teacher's activity adversely affects the school system. Therefore, the statute when construed as a whole, proscribes only

that conduct which, if performed, is detrimental to the educational progression of the students.

PROPOSITION III

FOR THE PROTECTION OF ITS YOUTH IN THE CONTEXT OF THE PUBLIC SCHOOL SYSTEM, THE STATE MAY REGULATE OBJECTIONABLE SPEECH WHICH COULD ADVERSELY AFFECT THE WELL BEING OF THE CHILDREN OR CAUSE THE DISRUPTION OF THE EDUCATIONAL PROCESS.

In Ginsberg v. New York, 390 U.S. 629 (1968), this Court upheld the conviction of the defendant for selling constitutionally protected pornographic material to a sixteen-year-old boy in violation of a state statute. The Court reasoned that a state may exercise its police powers to protect children from objectionable material.

"[M]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children . . . [T]he concept of obscenity or of unprotected matter may vary according to the group to whom the

questionable material is directed or from whom it is quarantined. Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults." 390 U.S. at 636, quoting Bookcase, Inc. v. Broderick, 18 N.Y. 2d 71, 271 N.Y.S.2d 947, 218 N.E.2d 668 (1966). (Emphasis added).

The same basic premise outlined in Ginsberg exists in the present case. This State enacted legislation to protect the well-being of the children. As in Ginsberg, the State's interest is two-fold. First, the parents of the children have the right to raise their children as they see fit, provided, of course, that the parents do so in the best interest of the children and society:

"The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for

children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." Id., 390 U.S. at 639.

Second, the State has its own interest in protecting the well-being of the children:

"While the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them." Id., 390 U.S. at 640, quoting People v. Kahan, 15 N.Y.2d 311, 258 N.Y.S.2d 391, 206 N.E.2d 333 (1965).

The State, through the challenged statute, is regulating the conduct of teachers which could have an adverse affect upon the students. Therefore, the State submits that the rationale of Ginsberg must be applied to the present action.

Once the Ginsberg special standard is applied, the State need show only a

rational relationship to a legitimate governmental goal. Id., 390 U.S. at 641-643. The Oklahoma Legislature has made a finding that teachers who advocate, encourage or promote criminal homosexual sodomy could impair the moral and value development of the children. The teachers, by their conduct, are encouraging their students to violate laws which the students may believe are unjust. Therefore, in view of the State's interest in the protection of the development of children, the conduct which the challenged statute proscribes cannot be deemed constitutionally protected speech.

The Supreme Court has repeatedly recognized that the State's interests as an employer "differ significantly from those it possesses in connection with the regulation of the speech of the

citizenry in general.'" Connick v. Meyers, 461 U.S. 138, 140 (1983); Pickering v. Board of Education, 391 U.S. 563, 568 (1968). The problem is one of balancing the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, "in promoting the efficiency of the public services it performs through its employees.'" Connick, *supra*, 461 U.S. at 140.

In CSC v. Letter Carriers, 413 U.S. 548 (1973), this Court upheld the Hatch Act provisions which prohibited federal employees from taking an active part in political campaigns. In Broadrick v. Oklahoma, 413 U.S. 601 (1973), a statute which prohibited state employees from "tak[ing] part in the management or affairs of any political party or in any political campaign, except to exercise

his right, as a citizen privately to express his opinion and to cast his vote." In CSC in particular, the Court recognized that forbidding partisan political activity would reduce the hazards to fair and effective government and that:

" . . . it is not only important that the Government and its employees in fact avoid practising political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous degree." 413 U.S. at 565.

In the public school system it is also important that a teacher maintain political neutrality and be viewed by the public and students alike as a dispenser of knowledge, not an advocate of social causes.

In Arnett v. Kennedy, 416 U.S. 134, 168 (1974), it was observed that the government, as an employer, must have

wide discretion and control over the management of its personnel and that "[p]rolonged retention of a disruptive . . . employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency."

In Oklahoma the democratically elected state legislature has made a judgment that teachers who advocate homosexual activity may be considered to be unfit if, based upon four factors set forth in Okla. Stat. Ann. tit. 70, § 6-103.15(C), the advocacy may adversely affect students or school employees. It can be assumed that many parents would object to their child being taught by a teacher who advocates conduct which is not only against the law but which is the subject of widespread societal disapproval and is against tenets of

certain religious teaching as well.¹

It, therefore, must be conceded that such an activity undertaken in the community by a teacher would be extremely controversial and disruptive of the educational process.

The State contends that the legislative judgment of Oklahoma in this regard should not be set aside by the federal judiciary. Public schools which desire to remove "gay rights" activists from teaching young children should not be prevented from doing so by the federal court system. This Court has

¹In I Corinthians 6:9-10 and Leviticus 18:22 and 20:13, homosexual activity is strongly condemned. The 1984 Book of Discipline of the United Methodist Church, p. 184, states that the practice of homosexuality is incompatible with Christian teaching, and avowed practicing homosexuals are not to be accepted, or appointed to serve in the United Methodist Church.